

# **HEALTH COMMITTEE**

Tuesday 23 May 2006

Session 2

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## HEALTH COMMITTEE

**13<sup>th</sup> Meeting 2006, Session 2**

### CONVENER

\*Roseanna Cunningham (Perth) (SNP)

### DEPUTY CONVENER

\*Janis Hughes (Glasgow Rutherglen) (Lab)

### COMMITTEE MEMBERS

\*Helen Eadie (Dunfermline East) (Lab)

\*Kate Maclean (Dundee West) (Lab)

\*Mr Duncan McNeil (Greenock and Inverclyde) (Lab)

\*Mrs Nanette Milne (North East Scotland) (Con)

\*Shona Robison (Dundee East) (SNP)

\*Euan Robson (Roxburgh and Berwickshire) (LD)

\*Dr Jean Turner (Strathkelvin and Bearsden) (Ind)

### COMMITTEE SUBSTITUTES

Mr Kenneth Macintosh (Eastwood) (Lab)

Mr Stewart Maxwell (West of Scotland) (SNP)

\*attended

### THE FOLLOWING GAVE EVIDENCE:

Lorna Brownlee (Scottish Executive Justice Department)

Bette Francis (Scottish Executive Health Department)

Jean MacLellan (Scottish Executive Health Department)

Sandra McDonald (Public Guardian)

Jan Raitt (Scottish Executive Health Department)

Diane Strachan (Scottish Executive Health Department)

Fiona Tyrrell (Scottish Executive Health Department)

### CLERKS TO THE COMMITTEE

Lynn Tullis

Simon Watkins

### SENIOR ASSISTANT CLERK

Graeme Elliott

### ASSISTANT CLERK

David Simpson

### LOCATION

Committee Room 4



## Scottish Parliament

### Health Committee

*Tuesday 23 May 2006*

[THE CONVENER *opened the meeting at 14:01*]

### Items in Private

**The Convener (Roseanna Cunningham):** I call the meeting to order. The first item on the agenda is to decide whether to take in private item 4, which is consideration of our draft report on the care inquiry. Do members agree to follow our usual practice?

**Members** *indicated agreement.*

**The Convener:** Item 5 is consideration of a paper on possible advisers for the Scottish budget 2007-08. Do members agree to take the item in private because we will be discussing the individual merits of specific people?

**Members** *indicated agreement.*

## Subordinate Legislation

**Ceramic Articles in Contact with Food (Scotland) Regulations 2006 (SSI 2006/230)**

**National Health Service (Pharmaceutical Services) (Scotland) Amendment (No 2) Regulations 2006 (SSI 2006/245)**

**National Health Service (Charges for Drugs and Appliances) (Scotland) Amendment (No 2) Regulations 2006 (SSI 2006/246)**

**National Health Service (General Medical Services Contracts) (Scotland) Amendment Regulations 2006 (SSI 2006/247)**

**National Health Service (Primary Medical Services Section 17C Agreements) (Scotland) Amendment Regulations 2006 (SSI 2006/248)**

14:02

**The Convener:** Item 2 on the agenda is consideration of five sets of regulations that are subject to the negative procedure. The Subordinate Legislation Committee has examined each set of regulations and has raised no issues. No comments have been received from any member of the Health Committee and no motions to annul have been lodged. Do members have any comments on the regulations?

**Members:** No.

**The Convener:** Are we agreed that the committee has no recommendations to make on any of the five sets of regulations?

**Members** *indicated agreement.*

## Adult Support and Protection (Scotland) Bill

14:03

**The Convener:** Item 3 on the agenda is a briefing from the bill team on the Adult Support and Protection (Scotland) Bill. I welcome the Executive's bill team. The briefing, which will mirror the structure of the bill, will be in three parts. Jean MacLellan, who is the bill team leader, will participate in all three parts of the briefing. Other officials will come to the table for relevant parts of the bill. I propose to take the briefing and questions on each part of the bill in turn.

The bill team may be aware that we have already had a briefing from the Scottish Parliament information centre, so it may be the case that a number of the questions that we would have had have already been dealt with satisfactorily by the SPICe team. I have no doubt that the officials are extremely disappointed that the briefing may not take quite as long as it might otherwise have done.

I invite Jean MacLellan to begin the briefing on part 1 of the bill. I understand that you want to take only about a minute.

**Jean MacLellan (Scottish Executive Health Department):** I am sorry. Can I take three minutes?

**The Convener:** Oh, I do not know. I had better clear that with the clerk.

**Jean MacLellan:** It would be good if I could have three minutes, largely because, as the Beatles song says, we have been

"waiting for this moment to arrive"

and are looking forward to explaining the policy to the committee and to answering any questions that members might have. The convener has already explained the running order, so I will not repeat what she said. I appreciate the time pressures, so I will limit my opening remarks on part 1 to a minimum.

The bill is being introduced now in response to a combination of drivers ranging from the Scottish Law Commission's initial work in the mid 1990s, a series of Mental Welfare Commission deficiency-in-care reports and the Borders inquiry, to demands for action from the Vulnerable Adults Alliance Scotland and from Age Concern on elder abuse, as well as public campaigns in the media about the need to enshrine in legislation measures that symbolise and embody Scotland's commitment to protecting adults at risk from abuse.

It is difficult to acknowledge and comprehend the fact that adult abuse takes place, but it does—

in families and in regulated settings. It happens in relationships of trust, in which it can be difficult for those who are isolated and being abused to speak out and seek the help that they need. Sometimes that is because they rely on that person for care and sometimes because they are afraid of reprisal.

We have come through the 1970s and 1980s, during which child protection and protection from domestic violence were addressed. Since the Scottish Law Commission's report, the Scottish Parliament has passed the Adults with Incapacity (Scotland) Act 2000 and the Mental Health (Care and Treatment) (Scotland) Act 2003, which both clearly meet the needs of some adults. The bill aims to complete that range of legislation so that adults who are subject to abuse, who neither lack capacity nor suffer from a mental disorder, are afforded protection when they need it too.

The picture is complex. That takes me to the definitions in the bill. The definitions of "adult at risk" and of the types of abuse have evolved through prolonged discussions with stakeholders. Formal consultation was pivotal in that process, as was discussion with the bill steering group and other representative groups. The aim is to provide modern workable definitions that take into account the individuality of human circumstance. Professional judgment, too, is vital in any successful application of those definitions.

To illustrate, it is envisaged that the following groups would benefit from the bill. It would benefit frail older people who may not yet be diagnosed as lacking capacity but whose cognitive functioning is diminishing. It would also benefit people who have been treated under the Mental Health (Care and Treatment) (Scotland) Act 2003 but who, although they no longer need that kind of support, may be more broadly vulnerable. It may benefit some people with learning disabilities and we understand from those we have consulted that it may also benefit some care leavers whose post-care lifestyles may be chaotic and place themselves and others at risk.

However, the bill will also assist practitioners with the many difficult decisions that they face daily. It will, for example, give them rights of entry to premises where it is alleged that abuse is taking place. At a systems level, the formation of an adult protection committee will help professionals to exercise their judgment in making the least restrictive interventions possible. That is crucial because, as the surrounding principles emphasise, any actions that are taken must benefit the individuals concerned and, where possible, their wishes and feelings should be taken into account.

Adult protection is an extremely sensitive issue. We will continue to address it sensitively and to strike an appropriate balance between protecting

people and enabling them to live fulfilling lives. To enable that balance to become embedded in day-to-day practice, we will continue to undertake evidence-based research across Scotland. We will work closely with stakeholders to produce robust guidance and codes of practice, thus ensuring that, when professionals exercise their judgment, the result will be meaningful outcomes for those who need it most.

Should the committee wish to receive a further informal briefing from the bill steering group that has influenced our policy thinking, we would be happy to set that up.

**The Convener:** Do you want to do a one-minute briefing on part 1 of the bill now? I understood that you would do a quick briefing about each part of the bill at each stage of the questioning.

**Jean MacLellan:** That was our briefing for part 1. It covered the main things that part 1 encompasses.

**The Convener:** In that case, I invite committee members to ask questions.

**Helen Eadie (Dunfermline East) (Lab):** Thank you for your description of part 1, which was helpful. Will you explain how the framework that you have described would interact with existing legislation?

**Jean MacLellan:** We are aware that there are gaps. The Adults with Incapacity (Scotland) Act 2000 covers those who lack capacity and the Mental Health (Care and Treatment) (Scotland) Act 2003 is largely for people with mental disorder, but there are a number of people who fall outwith those provisions. For example, neither act provides for the removal of a perpetrator.

**Mrs Nanette Milne (North East Scotland) (Con):** How much discussion have you had with people who might benefit from the bill, such as frail elderly people or younger disabled people?

**Jean MacLellan:** In the past year to 18 months, we have visited several resources and spoken to frail older people and to organisations that represent their interests. We have done the same for people with learning disabilities, people who are on the autistic spectrum and adult survivors of childhood sexual abuse.

**Mrs Milne:** Did that involve visiting people's homes, or were the visits to institutions?

**Jean MacLellan:** We did not visit people's homes.

**Helen Eadie:** The impact of human rights in many situations is very much in the news at present. The Scottish Law Commission considered that the temporary protection of an adult from abuse outweighs considerations about possible infringements on their privacy. To what

extent did you take that into account in arriving at your decisions?

**Jean MacLellan:** We took the Scottish Law Commission's statement very much into account. Before we introduced the bill, we had to ensure that it was proofed for compliance with the European convention on human rights. We are the policy making part of the bill team, but we had extensive discussions with our legal colleagues to ensure that the bill as introduced is competent in that regard. The balance between protection and choice is a delicate one.

**Kate Maclean (Dundee West) (Lab):** It will obviously be difficult to define who is and who is not at risk. Some people, such as those who have a mental illness, can be at risk at some times but not at others. Jean MacLellan referred to somebody who comes out of care and who has a chaotic lifestyle. If that person's situation changed, by what process would they stop being considered to be at risk of abuse?

**Jean MacLellan:** I will pass that over to my colleague Bette Francis, who has led on the definitions.

**Bette Francis (Scottish Executive Health Department):** The definitions are intended to be flexible, because we realise that, throughout people's lifetimes, they are more at risk of being abused at some times than they are at others. That was one reason why we moved away from the label "vulnerable", with which people were unhappy. We want it to be possible for the provisions to be used at times when people fall within the definitions that we now have of an adult at risk and of abuse. The bill is flexible and will enable support to be provided when those definitions apply.

**Kate Maclean:** If somebody who has fallen within the definition no longer falls within it, by what process will they be lifted out of the category of being at risk?

**Bette Francis:** If a person is no longer considered to be an adult at risk of abuse, the protection order will no longer apply. However, the adult protection committees will have a wider role in preventing abuse.

**Kate Maclean:** Can the person ask for the definition to be lifted, or will somebody else have to do that?

**Jean MacLellan:** The adult protection committee will take a strategic overview. We will assist by providing codes of practice that deal with the details. We have not yet completed the fine detail, although we are working our way through it.

**The Convener:** How does the bill relate to the criminal law? We are talking about the removal of adults at risk, the suspicion of abuse and banning

orders on a person or persons who abuse an adult at risk. Would it not be more appropriate to arrest and charge individuals who are doing the abusing? It is not clear to me from what I have read whether—and if so when—the criminal law comes in, or whether the bill is a way of dealing with people who are not charged under the criminal law.

14:15

**Jean MacLellan:** Diane Strachan will lead on that.

**Diane Strachan (Scottish Executive Health Department):** We certainly do not intend the bill to divert criminal behaviour from being dealt with under the appropriate criminal procedure, but a lot of the abuse that we are talking about would probably not reach the criminal courts. We want to be able to deal with such abuse effectively. Obviously, the police will be involved at the beginning of investigations and will take matters forward where there is a criminal case to answer.

**The Convener:** What do you mean by saying that a lot of the behaviour would not reach the criminal courts?

**Diane Strachan:** Anecdotally, we know that a lot of the abuse in question is hidden. Even when it is known about, there may not be sufficient evidence to take a case forward for a criminal prosecution. However, we may be able to stop abuse happening through appropriate investigation through any of the bill's intervention orders.

**The Convener:** How is that not an alternative, easier way? If we are talking about avoiding the higher standard of proof, is what you have described not an easier way and an opt-out from the criminal law? I am a bit concerned that individuals who are found to have abused vulnerable people may avoid the real sanctions that can be used for such abuse. I am not clear about how things will work. For example, will somebody who is the subject of a banning order go on the sex offenders register? What process is involved?

**Diane Strachan:** Each case would be different. As I said, the police would certainly be closely involved. Nothing would be done that would be detrimental to a criminal case proceeding if a criminal investigation was taking place. Obviously, it may be appropriate for an individual to be prosecuted and placed on the sex offenders register if an offence of a sexual nature has been committed, but it would be for individual—

**The Convener:** The use of banning orders would be decided using the civil standard of proof.

**Diane Strachan:** Yes, although a sheriff could decide to attach powers of arrest to a breach of a banning order, which would be a criminal offence.

**The Convener:** I understand that; but is the use of a banning order decided on a civil standard of proof?

**Diane Strachan:** Yes. The sheriff would have to be satisfied that a level of abuse had taken place before he could grant a banning order.

**The Convener:** I am curious about how a defence agent would behave in those circumstances. If a banning order was put on an individual who was subsequently charged, would the defence agent argue before the criminal court that the order in effect prejudices any criminal case?

**Diane Strachan:** I am afraid that I am not clear as to what the criminal procedure would be.

**The Convener:** There are two very different standards of proof.

**Diane Strachan:** Yes. The balance of probability is used for a civil order and the beyond-reasonable-doubt test is used in criminal cases. We would certainly want a banning order to proceed where there was an insufficient level of proof for a criminal conviction.

**The Convener:** But you do not know how a subsequent criminal charge would be affected.

**Diane Strachan:** No, I do not. I am sorry.

**The Convener:** Okay.

**Euan Robson (Roxburgh and Berwickshire) (LD):** I want to ask three questions. Adults at risk are defined in the bill as those who are affected by “disability, mental disorder, illness, infirmity or ageing”.

Let us say that a young person who is technically an adult because they are over 18 does not have a disability, mental disorder, illness or infirmity, but is dominated by a parental relationship that amounts to a form of abuse. How will that situation be coped with, given the definition? Can it be?

**Bette Francis:** A young person in such a relationship would not fall within the definition of abuse, although I understand that somebody in such a relationship could be dealt with under the Protection from Abuse (Scotland) Act 2001. As you said, the bill definition of adults at risk covers a number of people in other situations.

**Euan Robson:** But if you changed “ageing” to “age”, would the definition include both what you want it to cover and the circumstances that I described?

**Bette Francis:** It is intended to cover people who are at risk of abuse because of aging.



**Euan Robson:** That is interesting.

Section 4 is on the council's duty to make inquiries. If I read it correctly, which I might not have done, there is no sanction or further reference point in relation to the council's duty to make inquiries. What happens if the council does not make inquiries?

**Jean MacLellan:** In reality, that is already happening throughout the country. No council suggested to us in the consultation that it would not co-operate with the measures that are proposed. All councils support the measures and are keen to improve their practice through better information, co-operation, inquiry, investigation and subsequent disposal.

**Euan Robson:** I am sure that that is the case. The councils are well intentioned and the publicity of various cases in the past has made their duties clear to them. On the other hand, we are discussing legislation that will be in place for many years and there could be circumstances in which, due to time, neglect or other motivations, a council did not wish to make the proper inquiries. How can we ensure that there is a reference point beyond the council to ensure that it makes inquiries? There is no provision for that in the bill.

**Jean MacLellan:** The ultimate sanction will be through the Scottish ministers receiving the biennial report of activity. If that report was not available, it would be for ministers to intervene as they thought appropriate. However, given the demography of the aging population, I imagine that it will be very much in councils' interests to fulfil their responsibilities under the provisions. We are going to have more frail older people who are likely to need protection.

**Euan Robson:** I will take the matter one step further before I move on to something else. If the minister finds from the biennial report that council X has not made inquiries and subsequently intervened in the proper way, does the minister have powers to direct the council?

**Jean MacLellan:** Ministers would be able to ask inspection agencies to go in and conduct an inspection.

**Euan Robson:** Why are the police not included in the list in section 5, on co-operation?

**Jean MacLellan:** The police are included as members of the adult protection committee but they are not listed as having to share information because of their view that, if they had a duty to disclose everything, that might prejudice a criminal investigation.

**Shona Robison (Dundee East) (SNP):** I have a couple of questions on practicalities. I return to Roseanna Cunningham's point about banning orders. One consequence of implementing a

banning order and banning a primary carer from the premises could be that the person who is cared for would then require full-time care. Is there a safeguard to guarantee that resources will be available for the local authority to secure a residential place or care within the home? We can imagine a situation developing in which someone's primary carer is removed but no resources are available to provide an alternative. I think that we would want some safeguards and security around that.

**Jean MacLellan:** I recognise your point, which has been made by others, and we discussed it with one of the sub-committees of the Association of Directors of Social Work. It is difficult to quantify how many people will be subject to removals as a consequence of the legislation. We have tried hard to quantify it by looking at national and international resources and research in the area, but no one can quantify the situation beyond prevalence rates that are based on small-scale studies.

It might be that the numbers will not be great and that they will be distributed across domestic as well as regulated settings. We cannot yet work out what proportion will be in each setting. Nevertheless, there will be instances where the primary carer might be the perpetrator of the abuse.

It might be sufficient to provide some low-level support services. Research from four pilots that were done in the United States looked at interventions and what worked with people. The result was not a need for lots more services; rather it was found that more counselling, care management and intervention at the therapeutic end made the difference to families who mostly wanted to stay together. Counselling and mediation were the main services that enabled that to happen.

If, however, in the final instance, someone was removed and primary care was removed as a consequence, a community care assessment would be needed. When we asked ADSW its opinion, it said that the numbers of removals would not be great and that consequently resources would not be hugely stretched.

**Shona Robison:** In that case, priority could be given to certain cases, according to the guidance.

**Jean MacLellan:** That might well be the case. We discussed this morning the ways in which eligibility criteria are operated throughout Scotland and how some areas have level 1 and 2 priority levels—critical or substantial—whereas others do not work in that way, to see whether what we wrote in our guidance and code of practice would encourage consistency.

**Shona Robison:** I ask you about undue pressure, which is an area of some controversy. Protection orders are normally granted with the consent of the adult at risk, but obviously that does not always happen when undue pressure is deemed to be the reason for the refusal of consent. You have probably been asked this question on a number of occasions, but given its hidden nature, how can it be proved that undue pressure has been exerted? What discussions have taken place about that?

**Bette Francis:** As you can imagine, there has been considerable discussion of undue pressure. The steering group discussed the matter and went to a vote on how such circumstances would apply. You are right that it is difficult to ascertain undue pressure. Practitioners have told us that they are aware of circumstances in which a person appears to offer consent, but it is the fear of reprisals that creates the appearance of giving consent. Such people are prepared to comply with the protection order if someone intervenes on their behalf.

We cannot give simple guidance, but we will be able to offer some practical examples from the range of representative groups to whom we have spoken about situations in which they have been aware of undue pressure not to comply and not to ask for the abuse to stop.

**Shona Robison:** Was it a close vote in the steering group?

**Bette Francis:** No, it was surprisingly in favour of there being a need for the provision. We are aware of the groups who are concerned about the use of undue pressure. Removal without consent is a last resort that is very much in keeping with the principles of the legislation.

**Shona Robison:** Is there international experience on which you can draw?

**Bette Francis:** I am not aware of any.

**Jean MacLellan:** We have tried to ascertain that and the answer is no.

**The Convener:** You mentioned the ADSW estimates of numbers of removals. Do you know how it made those estimates?

**Jean MacLellan:** I must have misled you in that regard. The estimates of prevalence rates and so on are ours and are based on existing research, with which ADSW agrees.

**The Convener:** What is the existing research?

14:30

**Jean MacLellan:** There are a number of pieces of research that date back to the early 1990s. Prevalence rates range from 4 per cent to 7 per cent. However, the case studies have been of a

qualitative nature and are small in number, so it is difficult to know whether the figures for the general population are accurate. To get a different handle on the issue, we have looked at experiences from the Borders inquiry. None of us wants to continue to revisit that or to overemphasise the Borders situation but, when visiting offices in the area, I was told that there had been a threefold increase in the number of referrals of adults, although the figure was still small. At one office, there had been 21 or 22 case conferences in a month, not all of which led to anything other than inquiry.

**The Convener:** Are you referring to the current context?

**Jean MacLellan:** Yes.

**The Convener:** In the current context, ultimately one looks to the criminal law. The bill proposes a much lower standard of proof. It is reasonable to assume that, if such a standard is introduced, more people will fall into the net.

**Jean MacLellan:** Your statement is probably accurate, but we have no way of knowing that. This morning, we met someone whose life and livelihood relate entirely to this area. We wanted to check whether there were any avenues that we had missed, and she confirmed the position for us.

**Dr Jean Turner (Strathkelvin and Bearsden) (Ind):** There is definitely a need to protect the people who need protecting and the most vulnerable, but we also need to protect the staff who go out to people's homes. The vagueness of what I have heard makes me wonder how many people will be prepared to go on a hunch that someone is being abused, especially when theft, fraud, embezzlement or extortion are involved. Seven days is not a long time to obtain the proof that might be required.

**Jean MacLellan:** Are you referring to removal orders?

**Dr Turner:** Yes.

**Jean MacLellan:** Removal orders relate to the alleged victims of abuse. They may be made for a maximum of seven days, so that assessment may take place, if that cannot be undertaken in the situation in which it is alleged that abuse is occurring. The assessment could take place within two days or on the first day of the seven-day period.

It is important that the rights of the workforce are upheld. The Scottish Social Services Council and the Scottish Commission for the Regulation of Care take an interest in that area. The forthcoming Bichard bill will deal with the issue of people who are unsuitable for work with at-risk adults. Many checks and balances are being included in the provisions as they are built up. Dave McLeod, who is a member of our bill team, is also working on

the Bichard bill team, to ensure that there is coherence between what we do in this proposed legislation and the likely provisions of the Bichard bill.

**Dr Turner:** Would information from one person who goes out to the household be enough to instigate the process, or would there be a case conference involving a general practitioner, a practice nurse, a district nurse and a health visitor? Would information be gathered from those people, so that notes could be compared, before a removal order was sought?

**Jean MacLellan:** Yes.

**Dr Turner:** So there would be some form of evidence.

**Jean MacLellan:** The approach that you have described is becoming normal practice. Local authorities and other partners are aware of the forthcoming legislation and are already beginning to work in that way.

There are differences throughout Scotland, but what tends to happen is that one or two people go out together. Generally, the initial assessment is carried out by two people—perhaps a main grade social worker with support from a senior social worker. It very much depends on the individual who has been referred; that dictates the most appropriate people to do the initial assessment. We have said that the local authority would take the lead in deciding who would investigate, and that would also give some flexibility. For example, the referral might be of a person who is known to someone from the Mental Welfare Commission for Scotland and it might be less distressing to the individual if that known person does the initial assessment. The case may go no further than the initial assessment, or there may be sufficient call for a case conference. That would take the form that you describe: all interested parties would give their view, decisions would be reached together and all parties present would be accountable for those decisions in future.

**Dr Turner:** Would you be able to extend the seven days, as can happen in cases of people who have been sectioned for mental health purposes, if that were thought necessary?

**Jean MacLellan:** No. That was a deliberate decision. We do not want, as an unintended consequence, an older person to be out of their home for longer than is necessary. If someone has been abused, it might be necessary to take them to a care home temporarily, so that they can be looked at, given some food and rehydrated. The intention, as far as is practically possible, would be to put them back into their own environment as soon as possible, so that they avoid experiencing the double jeopardy of having been abused and then admitted to care or put in limbo for any longer

than absolutely necessary. That was the rationale behind limiting the period to seven days.

**Dr Turner:** You might have two special needs people with different conditions living in close proximity to each other—perhaps living in the same building but not in the same accommodation—who abuse each other. When they were put into the accommodation in the first place, it may have seemed as if they were going to get on. How do you deal with situations that will not resolve themselves, in the circumstances in which we have so few places in special needs accommodation?

**Jean MacLellan:** The same principles of inquiry and investigation would apply, and the care commission may become involved. As you will be aware, at the moment the care commission becomes aware of allegations of abuse largely through the complaints system. We have worked with the care commission to clarify what would happen in situations such as the one that you described. The care commission, which will be part of the local adult protection committee, would be content for the local authority to lead the investigation. When a situation affects more than one individual and starts to affect a service, the care commission would be involved in the judgment about what should happen, in conjunction with the care provider.

**The Convener:** Is it intended that some form of register or record of banning orders should be made?

**Jean MacLellan:** I have not got to that stage yet. The matter is under discussion. The steering group will next meet at the beginning of June and we shall discuss specific issues with it then.

**The Convener:** So it is not intended that such a register would be part of the legislation.

**Jean MacLellan:** Not as it stands.

**Helen Eadie:** Turning to a different register, I am aware that the Scottish Executive has proposed a bill to introduce a register of people who are unsuitable to work with vulnerable adults. I wanted to ensure that those proposals would dovetail with the proposals for a register of people who are unsuitable to work with children.

**Jean MacLellan:** Just to reiterate the point that I made to Dr Turner, we are working on the Adult Support and Protection (Scotland) Bill, and Dave McLeod and I are also on the Bichard bill team, to ensure that we get that coherence.

**Euan Robson:** Does the bill place a duty on the council to keep proper records?

**Jean MacLellan:** There is a broad expectation of that under the general duties of the adult protection committee, which the code of practice will make clear.

**Euan Robson:** But that expectation is not made explicit in the bill.

**Jean MacLellan:** No.

**The Convener:** It is worth reminding everybody that the definition of abuse in the bill is not confined to physical and sexual abuse, but encompasses other forms of abuse. That has implications for how the banning orders are recorded and maintained.

We require to change witnesses for questions on part 2 of the bill, which deals with amendments to the Adults with Incapacity (Scotland) Act 2000. I think that Euan Robson and I are the only members of the committee who were members of the Justice and Home Affairs Committee, which considered the 2000 act.

I invite Lorna Brownlee to give us a briefing.

**Lorna Brownlee (Scottish Executive Justice Department):** I head the team in the Justice Department, which is responsible for most parts of the 2000 act. My colleague Sandra McDonald is the public guardian, whose duties the act sets out; those duties were covered in the briefing from Jude Law—sorry, Jude Payne—[*Laughter.*]

**The Convener:** Most members of the committee sympathise with that slip.

**Lorna Brownlee:** Part 2 of the bill introduces changes to the 2000 act, which has been in force since 2001 and which we have been monitoring and evaluating. We funded a consultancy project, which Jan Killeen from Alzheimer Scotland - Action on Dementia ran for us. Jan is now the national practice co-ordinator and is on secondment to the Executive. As a result of her monitoring work, experience on the ground in the office of the public guardian and evidence to the Justice 2 Committee, we have proposed a package of changes to the parts of the 2000 act that deal with powers of attorney, intromission with funds and guardianship and intervention orders.

**Kate Maclean:** I am interested in the provisions on intromission with funds. The bill proposes that organisations as well as individuals would be able to intromit with funds on behalf of an adult with incapacity. I am concerned about that. What kind of organisations would be able to do that and what monitoring would there be? Although an organisation could be deemed suitable, would its employees or volunteers who worked for it also be deemed suitable? I can understand that an adult with incapacity might not have any friends or relatives who would be able to deal with their financial affairs on their behalf, but if employees of a residential establishment where an adult with incapacity lived were able to intromit with funds, that could cause problems.

Another issue is the proposed changes to the system for countersignatories, who will no longer be required to come from a specified group and will not even need to know the adult with incapacity before they countersign the application. I cannot understand how that will work. Essentially, will anyone in the street be able to countersign an application, given that countersignatories will not need to know the individual or come from a specified group? If that is the case, will that not open up a number of possible problems?

14:45

**Lorna Brownlee:** There was quite a lot in that question, so I will start at the beginning.

On the issue of organisations intromitting with funds, I agree that a lot of issues need to be considered. However, there was overwhelming support in the consultation for the idea of moving beyond individuals because one of the main barriers to take-up was that people with incapacity sometimes do not have anyone who can intromit with funds for them. We are working with different stakeholders to consider the matters that ministers will prescribe in relation to which organisations can be authorised by the public guardian to intromit with funds. Essentially, those matters will involve consideration of corporate governance, financial management and staffing. The discussions that Sandra McDonald has had will lead to a further consultation, after which regulations will set out the matters on which organisations will need to satisfy Sandra McDonald before she is prepared to authorise them to intromit with funds.

**Sandra McDonald (Public Guardian):** From the work that we have done, the registration process for organisations is beginning to look like it will be quite hefty, but we think that such a process is necessary in light of the situation to which Kate Maclean alluded. We have used the care commission's registration for new organisations as a basis for our work, but we have also taken into account how local authorities deal with registration of services and the registration requirements of the office of the Scottish charity regulator. We have looked at a variety of formats rather than reinvent the wheel, as it were.

As Lorna Brownlee mentioned, it looks like we will probably deal with three issues. On issues of corporate governance, we will ask whether the organisation is a private or limited company and what its managerial structure is. We will also ask about its policies and procedures on risk management. We will set out all those issues in the guidance and will then ensure that the registration process leads the organisation to deal with those issues. On issues of financial management, we will ask about tracking, auditable

procedures and whether the organisation's accounts are independently vetted. On the issues of staff management that Kate Maclean mentioned, we will ask about things such as recruitment procedures, training and supervision. We are probably minded—I will need to check with Lorna Brownlee on this—to require staff to be checked by Disclosure Scotland and, when it is introduced, vetted by the Bichard central barring unit. That will probably be a given, but we have not finalised a decision on that yet.

**Kate Maclean:** I wanted to ask about that. Will there still be an assumption in favour of intromission with funds being done by a friend or relative? Would intromission with funds be carried out by an organisation only if there was no one else who could apply to manage the person's financial affairs? Obviously, some people do not have any friends or relatives who can do that for them. What happens in those situations at the moment?

**Lorna Brownlee:** One of the problems at the moment is that, if the individual with incapacity has no friend or relative who can apply to intromit with funds for them, the local authority is under a duty to apply for financial guardianship. That is not really in keeping with the principles of the 2000 act, which require that the least restrictive measure should be taken, but that is the only choice that local authorities have because currently they cannot apply to intromit with funds. That is an issue at the moment.

**Kate Maclean:** I have to say that I feel more comfortable with the local authority having that power rather than another organisation. I am happier about that aspect being centralised. What are your thoughts on the issue of the countersignatory no longer having to be someone who knows the adult?

**Lorna Brownlee:** Under the current legislation, the countersignatory needs to know the applicant and the adult. However, finding someone who knows both people can be difficult.

The purpose of the countersignatory is to attest to the suitability of the applicant. The adult already has a medical certificate, signed by their doctor. That means that, in a sense, the doctor is vouching for the existence of the adult and the fact that they do not have the capacity to manage their affairs. If I remember rightly, 100 per cent of consultees agreed that it was unnecessary to require the countersignatory to be someone who knew the adult as well as the applicant.

**Kate Maclean:** So what is the point of the countersignatory?

**Lorna Brownlee:** The point of the countersignatory is to attest to the suitability of the applicant, not to comment on the adult with incapacity.

**Kate Maclean:** A friend or relative could attest to the applicant's suitability, in that case.

**Lorna Brownlee:** They could do that at the moment, if they fell within the prescribed classes.

**Kate Maclean:** But, under the proposals, anybody will be able to do that, even if they are not in a specified category.

**Lorna Brownlee:** We feel that we have come up with a package of measures that strikes the right balance between opening up access to the scheme and increasing the risk to the adult.

There is a notion that someone who belongs to one of the prescribed classes will have certain attributes. However, if the classes are drawn too widely, they are not particularly meaningful and, if they are too narrow, you come up against the problems that we have come up against.

There will be a range of safeguards. The person who countersigns the application will have to say, in their own words, how they know that the applicant is a suitable person and what gives them the required knowledge to make that declaration. They will not simply tick a box to say that they are, for example, a civil servant and are therefore the right person to sign the declaration. They will have to sign a declaration that says whether they have any pecuniary interest in the application and give contact details so that the public guardian can follow up any queries that she might have.

The other thing to remember is that all applications for intromission with funds have to be intimated by the public guardian to significant other people. We are introducing a new safeguard, which is that, if the applicant, the primary carer and the nearest relative are all the same person, the application will have to be intimated by the public guardian to the local authority.

**Dr Turner:** That is a welcome move. As an MSP, I have been struck by how vulnerable people are when they are depressed and have to be in hospital for a long time. If someone else has been given the power of attorney, a person can come out of hospital to find that everything they owned has been sold. Checks and balances in that regard are important.

What is the situation as regards English law and Scots law in relation to the power of attorney? Many people's relatives live on the other side of the border, so what are the differences between how those two legal systems approach the matter? How do the differences affect people who have power of attorney for a person who lives on the other side of the border? How would such a person be affected if they were to move?

**Lorna Brownlee:** Generally, recognition depends on the law of the country in question. Under the Adults with Incapacity (Scotland) Act

2000, we recognise proxies that have been given under the law of other countries. In England and Wales, the Mental Capacity Act 2005 contains provisions for recognition of appointments that have been made elsewhere. Beyond that, the situation depends on the legislation in the country in question.

**Dr Turner:** If the United States of America or Canada happened to be one of the countries, would that make a big difference?

**Lorna Brownlee:** I do not know. Whether the power of a proxy in Scotland would be recognised in those countries would depend on the legislation in those countries.

**Dr Turner:** If someone could prove their power of attorney in a different country and it went through the proper channels, it would be likely to be accepted.

**Lorna Brownlee:** If the law provided for it to be accepted, it would be.

**Dr Turner:** It does do so at the moment.

**The Convener:** It might be better to put the matter in a slightly different way. If the vulnerable adult is in Scotland—that is what we are concerned about—then the issue is not so much whether America recognises the power of attorney, but whether we recognise an equivalent form that might or might not have been entered into in America. However, that will not arise often: I presume that the advice would always be to take out the power of attorney in the Scottish form in Scotland in accordance with Scottish requirements.

**Lorna Brownlee:** That would be particularly the case for powers of attorney where there has been no court involvement in the process.

**Dr Turner:** I know of families with daughters on both sides of the Atlantic who are trying to look after a parent, so the situation is complicated and it needs to be clarified.

**The Convener:** Of course it is complicated, but the requirements of the legal jurisdiction within which the vulnerable adult resides must be followed, regardless of where the relative might live at the time. In this case, we are talking about the requirements that we might impose in Scotland in the particular circumstances.

**Euan Robson:** The joint withdrawers provision, which I think was said to be necessary by a number of people, seems to be useful. However, it is possible for the joint withdrawers to disagree about their functions. The public guardian appoints them, in effect, so why does the bill use the phraseology that they “may” apply for directions as to their relative functions? Why not use the word “must”? What would happen if neither joint

withdrawer applied for directions and the affairs of the vulnerable adult were prejudiced because the withdrawers had failed to take advice? I presume that requiring them to seek such advice would be better for the adult at risk because there would then be a speedier resolution through the intervention of the public guardian.

**Lorna Brownlee:** We did not consider and reject that suggestion. We conceived of the situation only in the kind of permissive way that is written into the bill.

**Euan Robson:** Surely the point in making the provision prescriptive rather than permissive is that the issue would be resolved because there would be the imperative to seek a ruling from the public guardian.

**Sandra McDonald:** That sounds sensible. I think that we must discuss the matter further.

**The Convener:** We move on to part 3 of the bill—I suspect it will take considerably less time—which is on “Adult Support etc: Miscellaneous Amendments and Repeals”. I suspect that the best way to describe part 3 is to say that it deals with consequential provisions, so it may not be hugely problematic. Can we get a quick briefing on it?

**Jean MacLellan:** Jan Raitt will deal with ordinary residents and liable relatives, and Fiona Tyrrell is here to talk about changes to the mental health legislation. I will answer any queries on direct payments.

**The Convener:** We will go straight to members’ questions, unless the officials want to make short introductory statements.

15:00

**Jan Raitt (Scottish Executive Health Department):** I will give a brief introduction on sections 62, 64 and 65, on charges for community care services.

Section 62 will remove the liable relatives rule. An individual’s contribution to the care home fees that are paid by a local authority is normally calculated solely on the basis of his or her resources, but the liable relatives rule allows local authorities to demand a contribution from the care home resident’s spouse or parent. The rule has long been unpopular and is seldom used. When it has been applied, that has often been done inconsistently, which has caused distress for the people concerned.

Section 64 will clarify and update the legislation that determines which local authority is financially responsible for providing community care services when a person moves between local authority areas. The provisions’ aims are to ensure that there is a fair division of financial responsibility, to

remove doubt about the legislative basis for current practice and to extend the arrangements for adjustments between local authorities to cover care packages, in response to changing patterns of care provision.

Section 65 relates to persons who are placed in Scotland under an arrangement that has been made by a local authority in another part of the United Kingdom, the Channel Islands or the Isle of Man. We will need the provisions to enable us to implement the policy on cross-border placements that is currently being developed.

**Helen Eadie:** Given what the committee has heard, the obvious question that springs to mind is whether the Executive will give financial support to local authorities to enable them to implement the measures in the bill.

**Jan Raitt:** We do not envisage that there will be new financial burdens on authorities. The removal of the liable relatives rule will potentially remove an income stream for local authorities, but the rule is seldom used. In response to the consultation, only two local authorities said that they used the rule. One authority said that it does not collect revenue under the rule but wants to retain the facility to do so. The other authority was collecting £15,000 per year. We announced the intention to remove the liable relatives rule at the time of the introduction of the pension credit, from which local authorities gain, so the proposal will be cost neutral.

**The Convener:** For clarification, we are talking about the financial implications only of part 3 of the bill. We all accept that other parts of the bill have financial implications for local authorities.

**Euan Robson:** I appreciate that Jan Raitt said that policy on cross-border placements is being developed. However, an extreme interpretation of the powers in proposed new sections 87A(1) and 87A(2) of the Social Work (Scotland) Act 1968, which will be introduced by section 65, could allow the Scottish ministers to make a statutory instrument that covered a single individual. Is it intended that one or more statutory instruments will be made?

**Jan Raitt:** As the policy develops, we are keen to ensure that, if regulations that are to be made in England say that when a person is placed in Scotland the placing authority is financially responsible, there should be no scope for confusion because legislation in Scotland says that the Scottish local authority must fund the placement. We want to ensure that we can dovetail the arrangements, but because the English regulations are not yet formulated we do not know precisely what we will need to do. However, I think that one set of regulations will be needed.

**The Convener:** By "English", do you mean English, Welsh and Northern Irish?

**Jan Raitt:** Yes—the Department of Health covers England and Wales and we will also negotiate with Northern Ireland.

**The Convener:** It is worth putting that on the record. Some of us might suppose that Wales and Northern Ireland are not included when England is being discussed.

**Jan Raitt:** There would be separate negotiations with the Channel Islands and the Isle of Man, if necessary.

**The Convener:** If no further questions arise on sections 62, 64 and 65, I invite Fiona Tyrrell to speak briefly about section 67.

**Fiona Tyrrell (Scottish Executive Health Department):** Section 67 contains a small amendment to the Mental Health (Care and Treatment) (Scotland) Act 2003. The 2003 act introduced the Mental Health Tribunal for Scotland, which considers applications for compulsory care and treatment for people who have mental disorders. A doctor can extend an order that is made by the tribunal without reference to the tribunal, but any other change to the order must be considered by the tribunal. Patients and named persons can appeal to the tribunal against the order.

As an added safeguard, the policy intention is that the tribunal should be able to review an order if a patient has been subject to the order for two years without having appeared before the tribunal. However, the 2003 act does not meet the policy intention in that regard. If the act were to remain unamended, then the tribunal would have to review every order it made after six months. The amendment will correct that anomaly and ensure that the tribunal does not have to review an order until a person has been subject to it for two years.

**The Convener:** If members have no questions on section 67, we will move on.

**Jean MacLellan:** We discussed direct payments at last week's meeting, so I am assuming that members have background knowledge of the system. The bill will simply enable relatives to receive and use direct payments to provide services for someone in exceptional circumstances.

**The Convener:** The measure seems to be straightforward. I thank all the officials for their evidence. That ends our business in public.

15:06

*Meeting continued in private until 16:08.*





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